UNREPORTABLE

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **WP(C).No.8400/2006**

% **Date of Decision : August 17 , 2007**

#Ex Recruit Manoj Deswal **Petitioner**

! Through: Mr.A.K.Bakshi with Mr.R.K.Bakshi, Advocates.

Versus

$ UNION OF INDIA & ORS. **Respondents**

^ Through: Mr.Shishir Singh, Advocate

Maj.S.S.Pandey.

CORAM:-
*** HON'BLE MR. JUSTICE T.S. THAKUR**
*** HON'BLE MR. JUSTICE S.N. AGGARWAL**

1. Whether reporters of Local paper may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether the judgment should be reported in the Digest?

Per S.N. AGGARWAL, J.

The legality, validity and the effect of a discharge order terminating the services of the petitioner during training without giving him a show cause notice of proposed termination is the only question that calls for our consideration in this writ petition. The background facts of the case necessary to deal and decide the above referred question are not in dispute and are delineated herein below.

2. The petitioner was recruited for the post of Store Hand Technical (SHT) in Army Supply Corps and he joined basic military training at Army Training Centre, Bangalore on 14.8.2004. He

successfully completed his basic military training during the period between 23.8.2004 to 4.1.2005. He was granted annual leave for 28 days from 5.1.2005 to 1.2.2005. His technical training started in February, 2005. Immediately after start of his technical training, he fell ill and was hospitalised for four days from 4.2.2005 to 8.2.2005. Later he was granted 15 days casual leave from 24.2.2005 to 10.3.2005. On 11.3.2005 he rejoined his training but on that date he received a message from his home that his mother was not well. On 12.3.2005 he sought voluntary discharge but he withdrew the same on 14.3.2005. Thereafter he absented himself from the training from 2.4.2005 onwards till he rejoined training of his own on 21.7.2005. On 27.8.2005 he was informed by his Commanding Officer that his services stood terminated w.e.f. that date.
The discharge order was sent to the petitioner vide communication dated 22.9.2005 signed by Lt.Col., Senior Record Officer, for OIC Records, Bangalore. The petitioner was discharged from service during training under Army Rule 13(3)(IV) of the Army Rules, 1954 on the ground that he was unlikely to make an efficient soldier. It is this discharge order which the petitioner has challenged in the present writ petition.

3. Though the impugned discharge order has been challenged by the petitioner on several grounds but during arguments, the learned counsel appearing on behalf of the petitioner had restricted his arguments only on the point of service of show cause notice not given to the petitioner before terminating his services while he was undergoing training. It was contended by the learned counsel that the petitioner

could not have been terminated from army service without giving him an opportunity to explain his conduct relating to his alleged absence from training w.e.f 2.4.2005 till 21.7.2005. On the other hand, counsel appearing on behalf of the respondents had argued that the respondents were justified in terminating the services of the petitioner during training period as he unauthorisedly absented himself from training for a period of 108 days from 2.5.2005 till 21.7.2005. It was further contended by the learned counsel for the respondents that no show cause notice was required to be given to the petitioner in terms of Rule 13(3)(IV) of the Army Rules, 1954 before terminating his services on the ground that he was unlikely to make an efficient soldier. As per counsel for the respondents there is no infirmity in the impugned discharge order and the same cannot be interfered with only for want of service of show cause notice upon the petitioner.

4. We have heard the learned counsel for the parties and have also perused the record. It is not disputed that the services of the petitioner were terminated while he was undergoing training in exercise of powers conferred on the Commanding Officer under Rule 13(3)(IV) of the Army Rules, 1954. It is also not disputed that the petitioner was not given any show cause notice of proposed termination before he was actually terminated from Army Service w.e.f 27.8.2005. The stand of the respondents is that no such show cause notice was required to be given while invoking powers under Rule 13(3)(IV) of the Army Rules, 1954. To appreciate the said contention on behalf of the respondents, it would be necessary to refer to the provisions of Rule 13(3)(IV) of the Army Rules, 1954 and the same are reproduced herein

below :-

"**Rule 13**

Authorities.....:

Sub-Rule (3)(IV)

Category	Grounds of discharge	Competent authority to authorise discharge	Manner of
1	2	3	4
Persons enrolled under the Act but not attested.	IV. All classes of discharge.	Commanding Officer or officer commanding Recruit Reception Camp or a Recruiting, Technical Recruiting or Deputy Technical Recruiting Officer.	In the case of persons requesting to be discharged before fulfilling the conditions of their enrolment, the Commanding Officers will exercise this power only where he is satisfied as to the desirability of sanctioning the application that the strength of the unit will not thereby be unduly reduced. Recruits who are considered unlikely to become efficient soldiers will be dealt with under this item.

5. A plain reading of the above rule would show that the Commanding Officer was competent to discharge any recruit if he is of the view that such a recruit is unlikely to make an efficient soldier. It is true that the rule does not contemplate service of a show cause notice on the person concerned before terminating his services on the said ground. We are of the view that if the rule does not expressly provide for service of a show cause notice then this by itself does not necessarily imply that the Commanding Officer can discharge the services of a recruit arbitrarily. The termination of services of a person has serious consequences. The termination of an employee not only deprive the

employee terminated from service from his right of livelihood but also deprive his other family members who are dependent for their bread and butter on him. Article 21 of the Constitution guarantees to every citizen that his right to life or liberty cannot be taken away except with due process of law. The question is what is 'due process of law' as envisaged in Article 21 of the Constitution vis-a-vis termination of services of an employee. In our view, the due process of law would necessarily encompass in its fold a right of hearing to be given to the person whose services are proposed to be terminated. It is true that the decision as to whether a recruit would or would not make an efficient soldier lies within the absolute discretion of the Commanding Officer under whom such a person is undergoing training but by no means the Commanding Officer can be allowed to exercise his discretion to terminate the services of a recruit by invoking Rule 13(3)(IV) without providing him a bare minimum opportunity of hearing in the form of a show cause notice of proposed termination.

6. ***In Surinder Singh Sihag vs UOI, 2003 I AD (DELHI) 123***, a Division Bench of this Court had relied upon the procedure laid down by the respondents in its circular dated 28.12.1988, the relevant provisions whereof reads as under :-

> "5.Subject to the foregoing, the procedure to be followed for dismissal or discharge of a person under AR 13 or AR 17, as the case may be, is set out below:-
>
> (a)Preliminary enquiry : Before recommending discharge or dismissal of an individual the authority concerned will ensure:-
>
> (i)That an impartial enquiry (not necessarily a court

> of inquiry) has been made into the allegations against him and that he has had adequate opportunity of putting up his defence or explanation and or adducing evidence in his defence.
>
> (ii)That the allegations have been substantial and that the extreme step of termination of the individual's service is warranted on the merits of the case.
>
> (b) Action by competent authority: The authority competent to authorize the dismissal or discharge of the individual will consider the case in the light of what is stated in (a)above. If he is satisfied that the termination of the individual's services is warranted, he should direct that a show cause notice be issued to the individual in accordance with AR 13 or AR 17 as the case may be. No lower authority will direct the issue of a show cause notice. The show cause notice should cover the full particulars of the cause of action against the individuals. The allegations must be specific and supported by sufficient details to enable the individual to clear understand and reply to them."

7. The administrative instructions extracted above holds the field even today as it was not disputed by the learned counsel appearing on behalf of the respondents that these instructions are applicable to Army personnel till date. Basing its decision on these instructions, it was held by this Court in ***Surinder Singh Sihag's case (supra)*** that action to terminate the services of a recruit can be taken by the competent authority only after service of show cause notice upon the delinquent employee. The relevant portion of this judgment is reproduced herein below :-

> "Thus, the delinquent employee must be given an adequate opportunity of putting his defence or explanation or adducing evidence in support of his case. The allegations against him must be substantial. Extreme step of termination of the individual's service is warranted only upon considering the merit of each case.
> Recommendations for dismissal or discharge is required to be forwarded to the competent

> authority, whereupon the intermediate authorities must consider the case in the light what is stated in clause (a) above.
> Only upon receipt of the show-cause notice action thereupon can be taken and thereafter only the competent authority may pass final orders."

8. ***In D.K.Yadav vs J.M.A. Industries Ltd.(1993)3 SCC 259,*** it was held by the Apex Court that before terminating the services of an employee the principles of natural justice are required to be complied with.

9. In ***Delhi Transport Corpn. vs. D.T.C Mazdoor Congress 1991 SCC (L&S) 1213,*** it was held by the Apex Court as under :-

> ".....that right to public employment and its concomitant right to livelihood received protective umbrella under the canopy of Articles 14 and 21 etc. All matters relating to employment include the right to continue in service till the employee reaches superannuation or until his service is duly terminated in accordance with just, fair and reasonable procedure prescribed under the provisions of the Constitution and the rules made under proviso to Article 309 of the Constitution or the statutory provisions or the rules, regulations or instructions having statutory flavour. They must be conformable to the rights guaranteed in Parts III and IV of the Constitution.
>
> It is thus well-settled law that right to life enshrined under Article 21 of the Constitution would include right to livelihood. The order of termination of the service of an employee/workman visits with civil consequences of jeopardizing not only his/her livelihood but also career and livelihood of dependents. Therefore, before taking any action putting an end to the tenure of an employee/workman fair play requires that a reasonable opportunity to put forth his case is given and domestic inquiry conducted complying with the principles of natural justice."

10. It is apparent from the above referred judgments that the services of the petitioner could not have been terminated by the

respondents without serving him with a show cause notice of proposed termination. Since in this case the show cause notice was admittedly not given by the respondents to the petitioner before discharging him from service, the impugned discharge order cannot stand the test of judicial scrutiny.

11. In all fairness to the learned counsel for the respondents, we would like to mention that the respondents' learned counsel had placed reliance upon another Division Bench judgment of this Court in ***Rajbir Singh vs. Union of India & Ors.2003 VI AD (DELHI) 541.*** This judgment was relied upon by him to buttress his contention that a recruit can be legally terminated by the Commanding Officer during training and his said decision is not open to judicial review. We do not dispute this proposition urged on behalf of the respondents. The point before us is to examine the effect of non service of show cause notice upon the petitioner. The facts of ***Rajbir Singh's case (supra)*** are almost akin to the facts before us. In that case also the services of a recruit were terminated by his Commanding Officer while he was undergoing technical training as in the present case. However, in ***Rajbir Singh's case (supra)*** the authorities had given show cause notice of proposed termination to the petitioner before his services were terminated. This lends support to our view that the service of a show cause notice upon the petitioner was a condition precedent before his services could be terminated vide impugned discharge order. In that view of the matter, the judgment in ***Rajbir Singh's case*** relied upon by the respondents' counsel is of no help to the case of the respondents.

12. There is yet another important aspect of this case which is

culled out from the pleadings of the respondents contained in their counter affidavit. In Para 13 of their counter affidavit, the respondents have referred to Army Headquarter letter No. A/ 20314/MT-3 dated 28.2.1986 according to which a recruit would not be allowed to rejoin his training in the event of his remaining absent for 30 consecutive days during basic military training period. It is provided in the above referred circular that the absentees for less than 30 days may be considered for relegation if otherwise found suitable for retention. It is further provided that once the technical training of a recruit has commenced, the discretion to discharge a recruit for such absence is left to the Commandant of the centre who may retain or discharge him considering the case on merits. In the present case, the petitioner had successfully completed his basic military training and he allegedly absented himself for 108 days while he was undergoing technical training at Bangalore prior to his impugned discharge. In case the petitioner would have been given a show cause notice before his impugned discharge then probably he could have explained his alleged absence from training and satisfied the Commanding Officer that his was a fit case to retain him in service in view of discretion conferred on the Commanding Officer in the above referred circular.

13. In view of the above, we have no hesitation in holding that the impugned discharge order terminating the services of the petitioner w.e.f 27.8.2005 cannot be sustained in law and the same is liable to be set aside. We accordingly quash the impugned discharge order and direct reinstatement of the petitioner in service forthwith subject to the following conditions:-

1. The respondents may hold a fresh enquiry against the petitioner after serving him with a show cause notice as per law.
2. The fresh enquiry against the petitioner, if held, should be completed as expeditiously as possible but not later than four months from today.
3. The question relating to back wages for the period between the date of impugned discharge and the date of reinstatement shall be dependent upon the final outcome of the fresh enquiry to be held against the petitioner. Needless to say that in case no fresh enquiry is held, the petitioner shall be entitled to back wages as well as seniority immediately on expiry of four months given for completing the enquiry.

In the result, this writ petition succeeds and is allowed in terms referred above. No order as to costs.

S.N. AGGARWAL
(JUDGE)

August 17, 2007 **T.S.THAKUR**
mb **(JUDGE)**